RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000637-MR

DONALD RUCKER — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-CI-00148

WILLIAM E. BARNES, M.D.;
LIVINGSTON HOSPITAL HEALTHCARE
SERVICES, D/B/A LIVINGSTON COUNTY
HOSPITAL — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

VANMETER, JUDGE: Donald Rucker filed this medical malpractice action after he was informed that he tested positive for Hepatitis C. Rucker contends that the trial court erred in granting summary judgment in favor of Dr. William E. Barnes (Barnes) and Livingston County Hospital (LCH), and by dismissing

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

his claims on behalf of his children. Having determined that Rucker's notice of appeal was untimely filed, we must dismiss this appeal.

In 1989 Rucker received forty-two units of blood during the treatment of a gunshot wound. In 1992 he was admitted to LCH complaining of abdominal pain. Barnes consulted with the patient and tests were performed. One of those tests, which screened Rucker for the presence of anti-HVC indicated that Rucker may have been exposed to Hepatitis C. More specifically the report stated:

> A repeated reactive result may not necessarily constitute a diagnosis of Hepatitis C (non A, non B Hepatitis - NANBH) or indicate the presence of anti-body to Hepatitis C virus. If reactive, it is suggested that a supplemental assay . . . be ordered on this patient to obtain stronger evidence of the presence of anti-HCV. The supplemental assay is for research use only.

However, the test results were not disclosed to Rucker, and Barnes asserts that he was not notified of the results. No supplemental tests were ordered, and Barnes contends that Rucker never requested the results of his tests.

In 1997 Rucker discovered that he had been exposed to Hepatitis C. In 1999 Rucker, who still had not undergone any treatment for Hepatitis C, filed a complaint against Barnes and LCH on behalf of both himself and his three children. In July 2000 the court granted appellee LCH's motion to dismiss the

children as parties due to the failure to state a viable cause of action. In September 2000 the trial court entered a non-final order granting summary judgment on behalf of LCH, finding that because Rucker had signed a consent form acknowledging that Barnes was not a hospital employee ostensible agent liability did not exist. The court rejected Rucker's contention that the hospital had a duty to disclose the test results, instead concluding that LCH was entitled to judgment as a matter of law.

On December 17, 2002, the trial court entered a final and appealable order granting summary judgment in favor of Barnes and dismissing the action. The court found that regardless of whether Barnes was aware of Rucker's test results and whether Rucker was ever informed of those results Rucker was not harmed by any such negligence and was not entitled to damages since there was no evidence that the doctor's failure to inform him of his condition resulted in deterioration to his liver or health.

Rucker filed a timely motion to alter, amend, or vacate the December 17 order. On February 7, while the motion to alter, amend, or vacate was still pending, Rucker filed an addendum seeking to include an expert witness' affidavit regarding his damages. On February 10 the trial court entered an order denying Rucker's motion to alter, and on February 21 the court entered an amended order correcting a typographical

error in the February 10 order. Rucker filed his notice of appeal on March 19, 2003.

Pursuant to CR 73.02(1)(a), "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." Failure to timely file "shall result in a dismissal."[2]

The circuit court's order granting summary judgment in favor of Barnes and dismissing the case[3] had a notation of service date of February 10, 2003. Rucker's notice of appeal was not received and filed by the circuit court clerk until March 19, 2003, some thirty-seven days later.[4] As the notice of appeal therefore was filed seven days late, this court has no choice but to dismiss the appeal as untimely. CR 73.02(2).

Rucker argues that a different result is compelled because the running of time for filing a notice of appeal should be calculated from the February 21 entry of the amended order correcting a typographical error in the February 10 order. CR 60.01 allows a court to correct a clerical mistake at any time, either by motion of a party or on the court's own motion.

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[2] CR 73.02(2). *See Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918 (Ky.App. 1998); *Burchell v. Burchell*, 684 S.W.2d 296 (Ky.App. 1984).

[3] The nonfinal order granting summary judgment in favor of LCH was specifically made "Final and Appealable upon final disposition" of the remaining claims.

[4] The trial court docket sheet reflects the same.

However, application of the rule is limited to clerical errors,[5] and

> a motion to correct a clerical mistake "does not lead to relief from the underlying judgment...." Thus "[t]he time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment . . ." and not from the entry of an amended judgment.[6]

Thus, as stated in *Maslow Cooperage Corporation v. Jones*,[7] the February 21 order correcting a typographical error in the February 10 order "could not operate to revitalize the judgment in such a way as to start anew the running of the period for taking an appeal."

For the foregoing reasons, this appeal is ordered DISMISSED as having been untimely filed. CR 73.02(2).

ALL CONCUR.

ENTERED: May 13, 2005

/s/ L. B. VanMeter
Judge, Court of Appeals

[5] *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 452 (Ky. 1996).

[6] *United Tobacco Warehouse, Inc. v. Southern States Frankfort Co-op, Inc.*, 737 S.W.2d 708, 709-10 (Ky.App. 1987).

[7] 316 S.W.2d 860, 861-62 (Ky.App. 1958).

BRIEF FOR APPELLANT:

Donald Rucker, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE WILLIAM E. BARNES, M.D.:

Richard L. Walter
Paducah, Kentucky

BRIEF FOR APPELLEE LIVINGSTON HOSPITAL AND HEALTHCARE, D/B/A LIVINGSTON COUNTY HOSPITAL:

John A. Sheffer
Amy R. Perry
Louisville, Kentucky